Lim Eh Fa & Ors v Seri Maju Padu

HIGH COURT (KOTA BAHRU) — CIVIL APPEAL NO MT(3) 11-3 OF 1999
SURIYADI J
12 JULY 2002

Contract *— Sale and purchase of property — Delay in completion — Vacant possession to be delivered within 24 months from date of sale and purchase agreement — Deposit collected prior to signing sale and purchase agreement — Whether 24-month period to be calculated from date of sale and purchase agreement or when deposit was paid*

Land Law *— Housing developers — Delivery of vacant possession — Vacant possession to be delivered within 24 months from date of sale and purchase agreement — Deposit collected prior to signing sale and purchase agreement — Whether 24-month period to be calculated from date of sale and purchase agreement or when deposit was paid*

The plaintiff entered into a sale and purchase agreement ('the SPA') with the defendant. The defendant agreed to deliver vacant possession of the property to the plaintiff within 24 months from the date of the SPA ('the completion date'). In the event of any delay, the defendant agreed to pay damages amounting to 10% of the purchase price. The deposit was paid on 17 July 1992 and the SPA was executed on 10 October 1992. The plaintiff assigned all his rights, interest and title to the SPA to his financier by virtue of a loan agreement and a deed of assignment dated 12 June 1993. The defendant was late in delivering vacant possession of the property and as a result thereof, the plaintiff sued the defendant for damages. At the magistrate court, the plaintiff applied to enter summary judgment against the defendant. However, the magistrate dismissed the plaintiff's application. The plaintiff appealed against the decision of the magistrate. In this appeal, the issue for determination was whether, for purposes of calculating the completion date, time should begin to run from: (a) the date when the deposit was accepted; (b) the date when the SPA was signed; or (c) the date when the deed of assignment was signed.

Held, allowing the appeal:

(1) The date to take into consideration for the purposes of determining the completion date was 17 July 1992, when the deposit was paid. This was the date when the contract was struck and the date when the defendant assumed responsibility to fulfil its part of the bargain. If the date of signing the SPA were to be taken as the relevant date for purposes of calculating the completion date, the defendant could choose to execute the SPA as late as possible, which would prejudice the plaintiff's interest (see pp 265H–I, 266E–F).

(2) Accordingly, the defendant had failed to live up to its end of the bargain to deliver vacant possession of the said property within 24 months from 17 July 1992 (see p 267A–B).

A **[Bahasa Malaysia summary**

Plaintif telah memasuki suatu perjanjian jual beli ('perjanjian tersebut') dengan defendan. Defendan telah bersetuju menyerahkan pemilikan kosong hartanah tersebut kepada plaintif dalam tempoh masa 2 bulan dari tarikh perjanjian tersebut ('tarikh siap'). Sekiranya B wujud sebarang kelewatan, defendan telah setuju membayar ganti rugi pada kadar 10% harga pembelian. Deposit dibayar pada 17 Julai 1992 dan perjanjian tersebut ditandatangani pada 10 Oktober 1992. Plaintif telah menyerahkan segala haknya dibawah perjanjian tersebut kepada pembiaya pembelian tersebut di bawah suatu perjanjian C pinjaman serta suratikatan penyerahhakan bertarikh 12 Jun 1993. Defendan telah lewat menyerahkan pemilikan kosong hartanah tersebut dan, memandangkan sedemikian, plaintif telah menegelurakan saman ke atas defendan menuntut gantirugi. Dalam mahkamah majistret, plaintif telah memohon memasukkan penghakiman terus terhadap defendan. Majistret walau D bagaimanapun telah menolak permohonan plaintif. Plaintif merayu ke atas keputusan majistret tersebut. Dalam rayuan ini, isu yang perlu diputuskan adalah samada, bagi tujuan mengira tarikh siap, masa harus bermula dari: (a) tarikh deposit di terima; (b) tarikh perjanjian ditandatangani; or (c) tarikh suratikatan penyerahhakan E ditandatangani.

Diputuskan, membenarkan rayuan tersebut:

(1) Tarikh yang patut diambil kira bagi tujuan menentukan tarikh F siap adalah 17 Julai 1992, apabila bayaran deposit dipungut. Ini adalah tarikh perjanjian dicabai dan tarikh defendan memikul tanggungjawab bagi memunaikan bahagiannya dalam perjanjian tersebut. Sekiranya tarikh perjanjian ditandatangani diambil sebagai tarikh yang patut diambil kira bagi mengira tarikh siap, defendan dapat memilih menandatangani perjanjian tersebut G selewat mungkin, dan ini akan memprejudiskan kepentingan plaintif (lihat ms 265H–I, 266E–F).

(2) Berikutan ini, defendan telah gagal menunaikan bahagiannya dalam perjanjian tersebut menyerahkan pemilikan kosong hartanah tersebut dalam tempoh masa 24 bulan dari 17 Julai 1992 H (lihat ms 267A–B).]

Notes

For cases on delay in completion, see 3 *Mallal's Digest* (4th Ed, 2000 I Reissue) para 3729.

For cases on delivery of vacant possession, see 8 *Mallal's Digest* (4th Ed, 2001 Reissue) paras 2451–2455.

Cases referred to

Faber Union Sdn Bhd v Chew Nyat Shong & Anor [1995] 2 MLJ 597 (folld)

Hoo See Sen & Anor v Public Bank Bhd & Anor [1988] 2 MLJ 170 (folld)

Legislation referred to

Housing Developers (Control and Licensing) Regulations 1989 reg 11(2)

Subordinate Courts Rules 1980 O 26A

MS Ong (*Raja Eleena Siew Ang & Assoc*) for the plaintiff.

Jegathesan (*C Jegathesan*) for the respondent.

Suriyadi J: Three appeals were filed by the purchasers ('the appellants') of immovable properties called the Desa Maju Padu Condominium, Kota Bharu, Kelantan from the developer defendant. The appeals came about as the learned magistrate had dismissed the purchasers' summary judgment applications pursuant to O 26A of the Subordinate Courts Rules 1980. The appellants had claimed damages against the respondent defendant for late delivery of the immovable properties bought by them. The factual matrix further revealed that the appellants had much earlier filed three separate actions, later to be consolidated. For easy appreciation of this consolidated matter, I will concentrate on the appeal of the first appellant, the outcome of which will bind the other two cases.

To reiterate, the first appellant had bought one unit of the condominium at a cost price of RM75,300. Pursuant to that transaction, he had deposited RM7,530 being 10% of the purchase price, to the respondent on 18 July 1992. About three months later, ie on 10 October 1992, the first appellant executed a sale and purchase agreement ('the SPA'), with the respondent pertaining to that impugned unit.

It was agreed upon by the respondent that vacant possession would be handed to the first appellant within 24 months *from the date* of the SPA. In the event of any delay in the delivery of the relevant unit to the appellant, the respondent was to pay damages to the tune of 10% per year of the value of the unit. By virtue of a loan agreement and a deed of assignment signed on 12 June 1993, the first appellant had assigned his rights and interest over the impugned property to the fifth appellant (the bank).

In response to the statement of claim, the respondent in its defence alleged that the countdown in the handing over of the property, should begin on or before 12 June 1993 and not any other dates. That being so, the respondent asserted that it had fulfilled its part of the bargain within the stipulated time, except for the fixing of the septic tank and the piping system, which were outside its control.

The first appellant in retort alleged that the respondent was contracted to hand over vacant possession on or before 17 July 1994, but as delivery of

A vacant possession took place only on 1 December 1996, ie after a delay of 868 days, he was thus entitled to damages to the tune of RM17,906.96.

The legal poser before me, for the purposes of determining the date of vacant possession in a claim for liquidated damages, was whether it was the day the deposit was accepted, the day the SPA was executed or when the B deed of assignment was signed.

Counsel for the first appellant ventilated that the relevant date had to be the date the deposit was paid to the respondent, which was 17 July 1992 with vacant possession to take place on, or before 17 July 1994 (24 months). The respondent submitted 12 June 1993, ie the deed of assignment date, on the premise that the SPA had to be read with the former. It further C submitted that the first appellant could not have carried out payments in accordance with the schedule, as he had yet to obtain the financial support to finance his purchase. That being so, the appellant could only comply with the conditions of payments after he had managed to obtain a loan from the fifth appellant, which was the bank. On those grounds, the respondent D contended that 12 June 1993 must invariably take centerstage.

To really appreciate the issue at hand, it is quite imperative that I lay down certain portions of the SPA, in particular those found at pp 40–87:

(1) Clause 7 — Time shall be the essence of the contract in relation to all provisions of this agreement.

E (2) Clause 22(1) — The said parcel should be completed by the developers and vacant possession with the connection of water and electricity supply to the said parcel shall be handed over to the purchaser within 24 calendar months from the date of this Agreement.

(3) Clause 22(2) — If the developer fails to hand over vacant possession F of the said parcel together with connection of water and electricity supply to the said parcel in time the developer shall pay immediately to the purchaser liquidated damages to be calculated from day to day at the rate of 10%pa of the purchase price.

(4) Clause 23(2) — Upon the expiry of 14 days from the date of a notice G from the developers requesting the purchaser to take possession of the said parcel, whether or not the purchaser has actually entered into possession or occupation of the said parcel, the purchaser shall be deemed to have taken delivery of vacant possession.

Having heard the submissions of the appellant and the respondent, and H having intensely scrutinized the record of appeal, I was satisfied that no triable issue existed which warranted a full hearing. Based on that view, I allowed the appeal and accordingly allowed the summary application under O 26A of the Subordinate Court Rules 1980. I now supply my reasons.

As regards the date to take into consideration for the purposes of calculating the damages on the late delivery of vacant possession, I I concluded it to be 17 July 1992, ie the date when the deposit was paid, and not the date of the deed of assignment. To support my findings, I seek solace from the case of *Faber Union Sdn Bhd v Chew Nyat Shong & Anor*

[1995] 2 MLJ 597, which factually was on all fours with the current case. There, a purchaser had bought a unit of property from the developer (appellant). A deposit was paid on 17 February 1984 with the agreement being signed on 27 June 1984. The developer failed to deliver the impugned property within the agreed 36 months, whereupon the buyer claimed liquidated damages. Following an earlier case of *Hoo See Sen & Anor v Public Bank Bhd & Anor* [1988] 2 MLJ 170, the Supreme Court had decided that the relevant date for ascertaining when time started to run, to be when the booking fee was paid. Under '*held*', it is clearly authored:

> For the purpose of ascertaining the date of delivery of vacant possession, the relevant date when time started to run was the date on which the purchaser paid the booking fee, and not the date of the signing of the sale and purchase agreement.

Despite the submission that the appellant could only commence paying pursuant to cl 4(1) of the SPA after having received financial backing from the fifth appellant (the bank) and a deed of assignment having been executed, hence the assertion that time began to run on 12 June 1993, I found that argument unacceptable. Apart from the above case of *Faber Union Sdn Bhd* being crystal clear, in the event of the appellant failing to adhere to the schedule of payment, there was nothing to stop the respondent from imposing interest on the late payments. This right is sufficiently provided for under cl 8 of the SPA. Any failure on the part of the appellant, if any, to comply with cl 4, did not extinguish the responsibility of the respondent to fulfil the contract within the stipulated time.

One must bear in mind that the date of 17 July 1992, ie the deposit payment date, was the date when the contract was struck, and the very date the respondent assumed responsibility to fulfil its part of the bargain. If the date of the signing of the SPA were to be taken as the relevant date when time started to run for the delivery of vacant possession, the respondent could willy-nilly pick any dates it favored to execute the SPA, which would certainly prejudice the interest of the purchaser.

Under the Housing Developers (Control And Licensing) Regulations 1989 reg 11(2) reads:

> No housing developer shall collect any payment by whatever name called except as prescribed by the contract of sale.

In relation to this case, the above provision explicitly means that the respondent was permitted to accept deposits so long as it was provided for under the SPA. A reading of the receipt, found at p 39 of the record of appeal, highlighted that the payment was a 'deposit on apartment No 6, Floor 2, Kampong Cina, Kota Bharu, Kelantan.' What is the purpose of a deposit if not to indicate offer and acceptance, each with its respective responsibilities that must be fulfilled in accordance with the provisions of the SPA? The main obligation of the appellant was to pay in full the purchase price of the impugned properly (cl 4), failing which interest may be imposed on any late payments. At the other end of the agreement, it was

A the duty of the respondent to build, deliver and to hand over vacant possession within the agreed period to the appellant, failing which liquidated damages at the rate of 10%pa of the costs of the property must be paid to the appellant.

Based on the above reasons, I concluded that the respondent had failed
B to live up to its bargain to deliver vacant possession within 24 months, as indicated in the notice of 17 November 1996 (pp 132–133 of the record of appeal). Evidentially, pursuant to cl 23(2) of the SPA, the date of handing over was supposed to be 1 December 1996, a delay of 868 days (from 17 July 1994 until 1 December 1996). As I had concluded that there was no merit to the defense of the respondent, I thereupon allowed the appeal with
C costs, and accordingly granted the summary judgment application.

Appeal allowed.

Reported by Lim Lee Na

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